Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1250

STANDARD OIL COMPANY,
Appellant,

vs.

ROBERT G. SHARPE, MOTOR VEHICLE COMPTROLLER, STATE OF MISSISSIPPI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

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The appellee moves the Court to dismiss this appeal on the ground that it does not present a substantial federal question, and that certain of the contentions of appellant were not timely or properly raised; alternatively, appellee moves the Court to affirm the judgment of the Supreme Court of Mississippi on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to require further argument. Appellee further moves the Court to award damages pursuant to Rule 56(2) of the rules of this Court.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

On this appeal Standard Oil Company questions the validity of one of the Mississippi petroleum fuel tax statutes, § 27-55-313, Miss. Code Ann. (1972) (App. K).

The statute, § 27-55-313, in pertinent part levies a tax at the rate of ten cents per gallon on distributors of "other motor fuel" (including diesel fuel) for the privilege of selling or delivering the fuel to persons for use in performing construction contracts for the State of Mississippi or its agencies or political subdivisions. The specific pertinent language of the statute is,

> A tax at the rate of ten cents per gallon is hereby levied upon any distributor of other motor fuel . . . for the privilege of engaging in the business of selling and delivering other motor fuel to any other person who purchases or uses other motor fuel in performing contracts for construction . . . where such contracts are entered into with the State of Mississippi or any department, agency, or institution . . . .

B. The Proceedings Below

The Mississippi Motor Vehicle Comptroller, charged with administering the petroleum fuel tax statutes, assessed taxes and penalties in the sum of $198,543.26 against Standard Oil Company (a distributor under § 27-55-313) for diesel fuel sold by Standard to Mid-State Paving Company for use in the performance of

State Highway Commission contracts. The assessment was confirmed by an order of the Motor Vehicle Comptroller, entered after a full evidentiary hearing (App. E).

On appeal by Standard to the Chancery Court of Hinds County, the order of the Motor Vehicle Comptroller was reversed. The decision of the Chancellor was made on a point of statutory interpretation, and he specifically refrained from considering any constitutional issue (App. F, A36).

The Motor Vehicle Comptroller appealed to the Supreme Court of Mississippi. That Court reversed the Chancellor, holding adversely to Standard on both the statutory interpretation and constitutional points (App. G). See *Sharpe* v. *Standard Oil Co.*, 322 So. 2d 457 (Miss. 1975). This appeal by Standard followed.

II.

ARGUMENT

A. The Case Presents No Substantial Question Not Previously Decided By This Court.

Standard Oil Company contended that the specific fuel in question in this case was used by Mid-State Paving Company exclusively in asphalt plants for drying sand, and that it was not used in vehicles (App. B, A5). This alleged restricted use formed the basis for a statutory interpretation argument which was the chief contention of Standard through the State Supreme Court level of this case. Standard's contentions regarding use of the fuel were not borne out by the evidence, however. Following a full evidentiary hearing, the Mississippi Motor Vehicle Comptroller found as a mat-

ter of fact that the fuel was in many cases used generally by Mid-State (App. E, A17).

The primary constitutional grounds urged by appellant are alleged violations of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. These contentions were fully examined and correctly rejected by the Supreme Court of Mississippi. The portion of that Court's opinion dealing with these contentions follows:

> Standard's final contention involves a constitutional challenge. The argument is that to subject diesel fuel to the tax, when used as a heating agent, is discrimination violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution because other heating fuels, notably propane, are not subject to the disputed tax. The tax, it is urged, would increase the cost of diesel fuel to such proportions that Standard's business of selling diesel fuel for use as a heating agent would be destroyed in the same manner as the business in *Riley* v. *Ayer and Lord Tie Co.*, 147 Miss. 105, 113 So. 214 (1927). In *Riley* a privilege tax of twenty-five cents per thousand feet of lumber treated by creosoting plants was held to violate the equal protection clause because the taxpayer's whole business was destroyed by the tax, other like businesses not being so taxed. *Riley* is not dispositive of the constitutional question before us, for while the entire production of the creosoting business was taxed in that case, only one specific use of one specific product is being taxed in the instant case: The use of diesel fuel by a contractor to heat asphalt to be used in the performance of a state contract.

Subtle distinctions are, of course, not controlling on this constitutional matter. The correct inquiry is whether the classification is related to a legitimate state interest and, if so, whether the means chosen to effectuate that interest are reasonable. *Kahn* v. *Shevin*, 416 U.S. 351, 355, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959); *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 50 S.Ct. 310, 74 L.Ed. 775 (1930); *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920); *State* v. *Paramount-Gulf Theaters, Inc.*, 226 Miss. 404, 84 So.2d 403 (1956); *Southern Package Corp.* v. *State Tax Commission*, 174 Miss. 212, 164 So. 45 (1935). Nowhere is the power of classification accorded more latitude than in the field of taxation. While subject to the demands of the Fourteenth Amendment, "that Amendment imposes no iron rule of equality . . . ." *Ohio Oil Co.* v. *Conway*, *supra*, 281 U.S. at 159, 50 S.Ct. at 314, 74 L.Ed. at 782. *Accord*, *Allied Stores of Ohio, Inc.*, *supra*, 358 U.S. at 526, 79 S.Ct. at 440, 3 L.Ed.2d at 484; *New York Rapid Transit Corp.* v. *New York*, 303 U.S. 573, 578, 58 S.Ct. 721, 82 L.Ed. 1024 (1938). The state may tax certain kinds of property yet exempt others. *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245, 255, 43 S.Ct. 83, 67 L.Ed. 237 (1922).

The United States Supreme Court has addressed the instant classification problem on several occasions. *Heisler*, *supra*, concerned a state taxing statute which levied a tax on anthracite coal production. Suit was brought alleging that the tax violated the equal protection clause because anthra-

cite coal was taxed while bituminous coal was not taxed. The Court held that the natural difference between the two coals constituted a "just basis for their different classification," and accordingly, upheld the tax. 260 U.S. at 257, 43 S.Ct. at 85, 67 L.Ed. at 242. *Lake Superior Consolidated Iron Mines* v. *Lord*, 271 U.S. 577, 46 S.Ct. 627, 70 L.Ed. 1093 (1926) involved a like tax levied upon ore lands but not upon other producing lands such as quarries and forests. Citing *Heisler, supra*, the Court affirmed the tax classification on the basis of the differences in the natural resources. 271 U.S. at 582, 46 S.Ct. at 629, 70 L.Ed. at 1101. In *Broad River Power Co.* v. *Query*, 288 U.S. 178, 53 S.Ct. 326, 77 L.Ed. 685 (1933), a suit was filed contesting the validity of a South Carolina law that taxed the production of electricity by hydroelectric power but not the production of electricity by oil or internal combustion engines. Again citing *Heisler, supra*, the Court held that the existence of comparatively few internal combustion electric plants was sufficent reason for creating the tax classification. 288 U.S. at 179-80, 53 S.Ct. at 327, 77 L.Ed. at 686. *See also Allied Stores of Ohio, Inc., supra.*

The foregoing demonstrates that no constitutional difficulties are raised by the fact that, within the tax classification of "other motor fuel [used] in performing contracts . . . with the state," the tax is applied to diesel fuel used by a contractor as a heating agent. The record shows that the state interest behind the tax is the prevention of "double dipping." The means chosen to halt this practice is the termination of all refund and ex-

emption privileges for contractors using gasoline and other motor fuel in the performance of state contracts. In this way the contractors may recover their fuel tax cost but once through the contract bid and not a second time by way of a refund or exemption.

Finally, apart from the pronounced state interest in ending "double dipping," a more basic reason may be relied upon to sustain the discrimination between propane and diesel, specifically the inherent differences between propane and diesel fuel. These differences were testified to by a witness for the Comptroller and form in and of themselves a sufficient basis for the tax classification. *Heisler, supra*, 260 U.S. at 257, 43 S.Ct. at 85, 67 L.Ed. at 242; *Allied Stores of Ohio, Inc., supra*, 358 U.S. at 528, 79 S.Ct. at 441, 3 L.Ed.2d at 486. 322 So. 2d at 460-61.

The witness referred to by the Supreme Court of Mississippi was Everard Green Baker, Jr., Assistant State Chemist, Director of Petroleum Products Laboratories of Mississippi. He held a Master of Chemical Engineering degree. He testified in detail regarding the inherent differences between propane and diesel fuel. The two fuels have vastly different molecular structures. Diesel fuel contains sulphur compounds which have an offensive odor. Diesel fuel burns "dirtier." The vapor pressure of propane is much higher, requiring that it be contained in expensive pressure vessels, whereas diesel fuel can be carried in an ordinary lard bucket. Propane is suitable for cooking. Diesel fuel is not. Propane has specialized agricultural uses, whereas diesel fuel does not. Propane was previously "flared" or

wasted in the oil fields, but due to the current fuel shortage, it and other gaseous hydrocarbons are now collected and marketed. Various governmental units in the United States are now encouraging the use of propane and similar fuels, for their nonpolluting qualities (App. M).

It is settled law that where no substantial federal question is raised on appeal to this Court, the appeal must be dismissed. See *Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U.S. 390 (1952); *Zucht* v *King*, 260 U.S. 174 (1922). In light of the line of cases cited by the Supreme Court of Mississippi, the question attempted to be raised by Standard cannot be considered substantial. Contrary to the contentions of Standard, there are strong precedents in support of the constitutionality of state statutes taxing certain kinds of property and exempting others. The *Allied Stores*, *Broad River Power*, *Lake Superior Consolidated*, and *Heisler* cases cited by the Supreme Court of Mississippi are representative of these. Standard's contentions have been many times rejected by this Court.

In *Gurley* v. *Rhoden*, 421 U.S. 200 (1975), the petitioner made a more credible Fourteenth Amendment equal protection argument than that made by appellant here. This Court stated of that argument, "The contention is patently frivolous." 421 U.S. at 212. The effect of that decision was to uphold a Mississippi sales tax statute.

The primary case cited and relied on by appellant is *WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117 (1968). That case involved discrimination against a foreign corporation solely because of its locus of incorporation, and is clearly no help to Standard on this

appeal. Standard's next-best case is *Riley* v. *Ayer & Lord Tie Co.*, 147 Miss. 105, 113 So. 214 (1927). *Riley* was quite thoroughly distinguished by the Supreme Court of Mississippi in the quote above, and does not, appellee submits, require further attention.

B. The Appellant Cannot Raise In This Court New Constitutional Issues.

In its jurisdictional statement, Standard at this level attempts to raise Fifth Amendment and Commerce Clause issues. As will be shown, these issues have never been timely raised at any previous level.

In the stipulation which formed a part of the record at the hearing before the Motor Vehicle Comptroller, Standard raised only a Fourteenth Amendment equal protection and due process question (App. B, A7). The order of the Motor Vehicle Comptroller discussed only Fourteenth Amendment equal protection and due process (App. E, A20). The opinion of the Chancellor, while it decided no constitutional question, mentioned only Fourteenth Amendment equal protection and due process (App. F, A36). The Supreme Court of Mississippi, as shown by the quotation above, mentioned only Fourteenth Amendment equal protection.

It was not until Standard filed a petition for rehearing before the Supreme Court of Mississippi that it made a passing reference to the Fifth Amendment, and not even then was the Commerce Clause mentioned.

In review of a state court decision, this Court will not review a federal question raised before it for the first time. *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973); *Hill* v. *California*, 401 U.S. 797, 805 (1971); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969) (collecting cases).

An attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late. *Herndon* v. *Georgia*, 295 U.S. 441 (1935). The Mississippi Supreme Court will not consider a constitutional issue not raised in the trial court. *Stewart* v. *City of Pascagoula*, 206 So. 2d 325, 328 (Miss. 1968). Of course, the Fifth Amendment due process clause only applies to the United States, and not to the individual states. *Taylor* v. *United States*, 320 F.2d 843 (9th Cir. 1963), *cert. denied*, 376 U.S. 916 (1964).

Thus it appears clear that appellant cannot raise its Fifth Amendment and Commerce Clause issues at this point. In any event, appellant's jurisdictional statement cites no Fifth Amendment or Commerce Clause cases even remotely on point, and its contentions under those portions of the Constitution do not rise to the level of substantial federal questions.

III.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, appellee respectfully submits that the questions upon which this cause depends are so insubstantial as not to require further argument, and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Mississippi. Appellee further moves the Court to award damages pursuant to Rule 56(2) of the rules of this Court.

Respectfully submitted,

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